LEE PENG KONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NO. 51-83-85]
19 AUGUST 1986

CRIMINAL LAW AND PROCEDURE: *Appeal against conviction - Court faced with acute dilemma - Balance between deterrent sentence and certain mitigating factors - Whether appeal should be allowed.*

The appellant was prosecuted in the First Magistrate Court, George Town, for dishonestly misappropriating for his own use certain property, to wit cash RM162,000 belonging to a bank, thereby committing an offence punishable under s. 403 of the Penal Code. In the event, he pleaded guilty, was convicted and sentenced to 12 months' imprisonment. Against this sentence he now appeals.

According to the prosecution, a clerk at the said bank mistakenly credited a sum of RM164,284.92 from an account belonging to a company into the appellant's account. This amount was reflected in the bank statements issued to the appellant. Instead of informing the bank, the appellant helped himself to the money by issuing three separate cheques. All three cheques were duly presented and paid.

Later the same month the bank detected the error. A police report was duly lodged and the appellant arrested. The appellant made partial restitution in cash of RM45,000 and handed over a fixed deposit receipt for RM25,000. The appellant was also a first offender.

Held:

[1] The Court is here faced with an acute dilemma; the offence is of a kind which might be thought to call for a deterrent sentence having regard to its scope and the large amount of money involved but there are certain mitigating factors which are not to be disregarded.

[2] The appellant was a person of previous good character. His plea of guilty might offer some evidence of remorse and no doubt saved the Court much time and trouble had the case proceeded to trial. The appellant had also made substantial partial restitution. Moreover, this was not a highly organised offence involving a breach of trust or deception of any sort. In point of fact the bank concerned had no doubt inadvertently put temptation in the way of the appellant by wrongly crediting his current account.

[3] The appellant's case was not one of breach of trust and therefore the Court was prepared to treat temptation as a mitigating factor of the most potent kind. What more, the effect of the appellant going to prison would most probably entail loss of his job and other attendant benefits.

[4] In all the circumstances, the appeal against sentence was allowed to the extent of reducing the sentence from 12 months' to 6 months' imprisonment.

Other source referred to:

Principles of Penal Law Works, Bowring Edn., Vol. 1, p. 400

For the appellant - K.H. Chua; M/s. Chua & Co.
For the respondent - Ahmad Nasfy bin Mohd. Yasin; DPP

JUDGMENT

Edgar Joseph Jr J:

This appellant was prosecuted in the First Magistrate Court, George Town, upon the following charge:

> That you, between the 7 May 1984 and 22 May 1984 at the Development & Commercial Bank No. 48, Bishop Street, in the District of Georgetown, in the State of Penang, dishonestly misappropriated for your own use certain property, to wit cash RM162,000 belonging to the said Development & Commercial Bank, and thereby committed an offence punishable under s. 403 of the Penal Code (Cap. 45).

In the event, he pleaded guilty, was convicted and sentenced to 12 months' imprisonment. Against this sentence he now appeals.

According to the prosecution, on 5 April 1983, a clerk at the Development and Commercial Bank had mistakenly credited a sum of RM164,284.92 from an account No. 20012-002363-8 belonging to Sharp Roxy Company (M) Sdn. Bhd. into the appellant's current account. This amount was reflected in the bank statements issued to the appellant. Instead of informing his bank of the error, the appellant helped himself to the money by issuing three separate cheques, the first, on 7 May 1984, to one Ong Seng Huat, for the sum of RM10,000, the second, on 8 May 1984, also to Ong Seng Huat, for RM150,000 and finally, on 22 May 1984 to himself, for a sum of RM2,000. All three cheques were duly presented and paid.

It was only on the 30 May 1984, that the bank detected the error. A police report was duly lodged and the appellant arrested on 28 June 1984, when he made partial restitution in cash of RM45,000 and handed over a UMBC fixed deposit receipt for RM25,000.

The appellant is aged 34 years, married with two children, the sole bread winner of his family and is still employed as a Supervisor at the Empat Ekor Company. He is also a first offender.

The Development & Commercial Bank had obtained a Receiving Order and an Adjudication Order against the appellant and had entered a caveat against a flat owned by him.

Before me, the sentence was attacked by Counsel for the appellant, most ably, on a number of grounds. At the conclusion of the argument yesterday I reserved my decision until today. I shall now state my reasons for the conclusion which I have reached.

The Court is here faced with an acute dilemma; the offence is of a kind which might be thought to call for a deterrent sentence having regard to its scope and the large amount of money involved but there are certain mitigating factors which are not to be disregarded. I would state them thus:

1. The appellant is a person of previous good character, but this, in my opinion, should only have marginal effect having regard to the gravity of the offence, the element of greed and the large amount involved.

2. The plea of guilty which might afford some evidence of remorse and no doubt saved the Court much time and trouble had the case proceeded to trial.

3. The fact that the appellant made substantial partial restitution though admittedly this only happened after the offence came to light.

4. This was not a highly organised offence involving a breach of trust or deception of any sort. In point of fact the bank concerned had no doubt inadvertently put temptation in the way of the appellant by wrongly crediting his current account.

The question therefore arises: Is it right to treat an offence committed after an offender succumbs to temptation as morally less blameworthy than an offence committed without temptation? Generally speaking, the presence of temptation diminishes the gravity of an offence because it supplies an explanation as to why the offence was committed which does not imply a high degree of wickedness on the part of the offender: it suggests the possibility that the strong temptation was such as to overwhelm reasonably normal controls.

I would refer to the following passage from Bentham from his work on the *Principles of Penal Law* (Works, Bowring Edn., Vol. 1, p. 400):

> Authors of celebrity ...have said that the greatness of the temptation is a reason for the lessening of the punishment because it lessens the fault; because the more powerful the seduction, the less reason there is for concluding that the offender is depraved...

Had the instant case been one of breach of trust I would be most reluctant to regard the culpability of the victim in placing temptation in the way of the appellant as a mitigating factor. The reason for this is easy enough to see: persons occupying positions of trust ought to possess or to develop stronger controls which are sufficient to withstand the temptations which naturally accompany the trust reposed in them. The existence of temptation, in such cases, is part and parcel of the positions of trust just as previous good character is a natural precondition of occupying such a position and anyone who assumes such a position has the additional obligations which go with it. Accordingly, generally, temptation should not be a mitigating factor in case of breach of trust.

This appellant's case is not one of breach of trust and I am therefore prepared to treat temptation as a mitigating factor of the most potent kind. I might mention in passing that nowhere in the grounds of decision was any mention made of this factor.

Finally, the effect of the appellant going to prison will most probably entail loss of his job and other attendant benefits.

In all the circumstances, I would allow the appeal against sentence to the extent of reducing the sentence from 12 months' to 6 months' imprisonment.

Also found at [1986] 2 CLJ 139